CORRUPTION, CLIENTS, AND POLITICAL MACHINES: A RESPONSE TO PROFESSOR ISSACHAROFF

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Politics costs money. Television ads, billboards, fliers, phone banks: the normal tools of democracy have to be paid for somehow. Unless the government decides to fund every campaign — and to ban anyone else from spending money on speech — then politicians will have to raise funds of their own.

In his Comment on political corruption,[1] Professor Samuel Issacharoff rightly rejects the standard tropes of political corruption — that money corrupts, and that lots of money corrupts absolutely. Issacharoff performs a useful service by questioning these traditional accounts and by focusing attention instead on the effects that private influence can have on government policy. Unfortunately, the very breadth of his analysis runs the risk of turning corruption into too general a category to be useful, at least as a ground for legislation. In this Response, I propose a slight refinement on Issacharoff's model, in the hopes of limiting the concept of corruption to a manageable scope.

So long as private citizens are allowed to favor some candidates over others, elected officials will respond in kind, devoting public resources to particular private ends. No regulation can hope to stop that. What we might hope to control, however, is whether the *government* favors some candidates over others, by channeling public resources into self-sustaining political machines. If protecting the government from private influence is too diffuse a goal, we can at least attempt to protect the government from itself.

I. ISSACHAROFF'S DEFINITION OF CORRUPTION

A. Corruption as Clientelism

Despite the central role it has played in campaign finance reform, the "very concept of corruption was never clearly defined."[2] Some corruption is easy to classify: government officials can't trade official acts

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[1] Samuel Issacharoff, *The Supreme Court, 2009 Term — Comment: On Political Corruption*, 124 HARV. L. REV. 118 (2010).

[2] Frank J. Sorauf, Essay, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1350 (1994).

for personal benefits, like a briefcase full of cash. Many people view campaign contributions and other political spending the same way, as a bribe that wealthy interests pay to get the results they want. But campaign expenditures — particularly independent expenditures uncoordinated with candidates — are more complicated than that. The money doesn't inure to the candidate's personal interest, and true quid pro quo exchanges are rare (or hard to prove). In general, the law is too blunt an instrument to divide bad contributors from good ones: some people spend money to buy a candidate's loyalty, while others use their money to advocate for candidates with whom they share a vision of good policy.

Issacharoff properly rejects the view that campaign contributions are inherently corrupting. He turns away from these "inputs" to focus instead on "outputs": the "policies that result" from the incentives of our electoral system.[3] Issacharoff's particular worry is "clientelism," the "patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods."[4] As he frames the issue, the problem of corruption is that politicians "offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office."[5] To fight clientelism, Issacharoff would implement a combination of carrots and sticks — offering matching funds to encourage small contributions, and restricting the political activities of "those in a position to distort public policy — such as government contractors" and (perhaps) public-sector unions.[6]

B. Where Does Clientelism Stop?

This framing of the issue has an intuitive appeal. But Issacharoff's notion of clientelism also contains something slippery. "[P]rivate gain from public action" isn't limited to government contractors or big-ticket individual donors. Far more often, it's found in the government's relations to broader social groups with far greater aggregate political power. Farmers, homeowners, veterans, retirees: all have organized means of mobilizing support, as well as financial interests they expect the government to serve. If a candidate supports a cost-of-living increase in Social Security, and the voters who will receive that increase donate to his campaign, is that democracy in action, or a corrupt reward for "offer[ing] private gain"?

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[3] Issacharoff, *supra* note 1, at 126.
[4] *Id.* at 127.
[5] *Id.* at 126.
[6] *Id.* at 121.

Those who donate usually believe the former. But it's hard, when one's own interests are at stake, to make political decisions "with a sole regard to justice and the public good."[7] A century ago, a British legal scholar could ask with a straight face whether "the receipt of poor relief, in the shape of a pension, shall be consistent with the pensioner's retaining the right to join in the election of a Member of Parliament."[8] By contrast, "if receipt of government largesse were a disqualification," then "[i]t would take a modern Diogenes with a power-powerful lamp to find anyone today who could vote."[9]

When politicians put private interests before the public good, they act wrongly — even "corruptly." But whether a politician is "corrupt" in this subjective sense is impossible for the law to police. The politicians who support a cost-of-living increase in Social Security, even in the absence of measured inflation, may be engaged in a public-spirited (if selective) attempt to correct for systematic errors in the Consumer Price Index. Or they might see it as a chance to buy off a well-organized group of voters at the expense of future generations. Who can tell? The campaign finance system surely can't, at least not without putting Senators on the stand to testify about their motives.[10] And if "corruption" isn't about subjective motives, whether of the candidate or of the donor, then all that matters is the output of the process — here, a politically powerful group securing a greater share of the public fisc. Whether or not this seems "corrupt" will come down to one's views of good policy.

This type of soft clientelism is an endemic feature of politics. It was perfectly obvious even to the Framers that "[a] landed interest, a manufacturing interest, a mercantile interest, a moneyed interest,"[11] and others would all compete for the benefits of state policy: "Every shilling with which they overburden the inferior number is a shilling saved to their own pockets."[12] Nor is clientelism, as the concept is used in political science, even "confined to politics in a restricted sense."[13] Rather, it "proliferates in the arts, academia, religious congregations, the media, and business, wherever there is the power to appoint and grant access to benefits, goods, services, influence, and

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[7] THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 2003).

[8] A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY xxxv (2d ed. 1914).

[9] MILTON & ROSE D. FRIEDMAN, FREE TO CHOOSE 98 (1980).

[10] *But cf.* U.S. CONST. art. I, § 6, cl. 1 ("[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place.").

[11] THE FEDERALIST NO. 10, *supra* note 7, at 74.

[12] *Id.* at 74–75.

[13] Luis Roniger, *Political Clientelism, Democracy, and Market Economy*, 36 COMP. POL. 353, 369 (2004).

honors."[14] Self-interested actions abound whenever people are given a choice — and we cannot get rid of them unless we also get rid of choices. "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty . . . because it nourishes faction than it would be to wish the annihilation of air . . . ."[15]

C. Where Should Regulation Start?

Issacharoff is aware of this problem, and admits that clientelism is "inescapable" in a democracy.[16] He is content, in the absence of "precise substantive lines," to focus on what he considers the worst cases — the "express lanes" of private influence,[17] through which "important sectional supporters" may "'gain privileged access to public resources' for profit."[18] But when the problem is framed as broadly as "clientelism," it's hard to tell which cases are the worst. The politics of Social Security and Medicare do far more damage to the public fisc than a relatively tiny amount of earmarked spending. And no smoke-filled-room commitment could be better entrenched against public criticism than a farm-state Senator's endorsement of farm subsidies. When the government's budget is so heavily dominated by transfers among different groups, throwing up roadblocks to one pathway of private influence may just increase the relative force of another. Why care about relative advantage, if the game is so thoroughly rigged?

Consider Issacharoff's central proposal for additional regulation. He favors further restrictions on the activities of federal contractors[19] — who cannot make direct campaign contributions while their contracts are in effect[20] — because such contractors have a "double hold" on policy, exercising influence once in the political arena and again at the bargaining table.[21] Issacharoff analogizes these contractors to public employee unions, which have done very well for themselves by combining the political power of an interest group with the coercive power of a collective bargaining unit.[22]

The analogy, however, also shows the limits of the argument. A public-sector union may be a concentrated interest group, but more importantly it's a monopolist: the government is forced to negotiate with the union because the law says so. When the government buys

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[14] *Id.*
[15] THE FEDERALIST NO. 10, *supra* note 7, at 73.
[16] Issacharoff, *supra* note 1, at 129.
[17] *Id.*
[18] *Id.* at 128 (quoting Roniger, *supra* note 13, at 358).
[19] *Id.* at 141–42.
[20] 2 U.S.C. § 441c (2006).
[21] Issacharoff, *supra* note 1, at 139.
[22] *Id.* at 138–39.

goods or services from a monopoly provider, similar forces may be at work — just as they are in the broader economy, where monopoly power means consumers pay more. But when the government buys some competitive good like paper clips, the contract is not a source of influence; it is only one particular purpose to which influence may be put. And even if contract negotiations themselves "bypass the normal process of interest group bargaining,"[23] an agency's overall budget does not. Much of the time, a contractor may have no more influence than anyone else seeking government largesse — and the influence it has may be owed less to campaign spending than to personal connections or ties to a particular congressional district.[24]

That, perhaps, is why Issacharoff sees regulation of government contractors as merely "a partial inroad" into "the sector of the economy that does not face incumbent state officials as contracting parties but as subjects of regulation."[25] In other words, all of the economy. Issacharoff's broader goal of "insulat[ing] politics from the demands of those who would use public power for nonpublic-regarding aims"[26] will only be achieved when nobody is allowed to vote.

II. An Alternative Approach

The difficulty of confining anti-clientelist reforms within any manageable limits suggests that we should look elsewhere. Issacharoff, however, implicitly points to an alternative framing of the problem, when he suggests that those subject to campaign finance regulation "may welcome such a law as a protection against public officials intent on using their position to solicit funds for campaign expenditures."[27] Rather than trying to protect government resources from private actors, we might focus on protecting those resources from the politicians themselves — that is, preventing the diversion of government resources into self-funding political machines. That focus might avoid some of the gauziness of Issacharoff's platform, while explaining his policy proposals' intuitive appeal.

A. The Fight Against Machines

The United States already has substantial experience with government-funded politics. Under the nineteenth-century spoils system — a clientelist system if there ever was one — government employees were

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[23] *Id.* at 138 (footnote omitted).

[24] *Cf.* Eric Lipton & David M. Herszenhorn, *Lobbyists Court Potential Stars of House Panels*, N.Y. Times, Oct. 27, 2010, at A1, *available at* http://www.nytimes.com/2010/10/27/us/politics/27chairs.html.

[25] Issacharoff, *supra* note 1, at 141.

[26] *Id.* at 140.

[27] *Id.* at 141.

added to the public payroll in exchange for redirecting a substantial chunk of their salaries back to the party hierarchy. By 1878, as much as "ninety percent of the money raised by the Republican congressional committee came from assessments on federal officeholders."[28]

Today, the Hatch Act restricts the political activities of certain federal employees.[29] The Supreme Court has explained this restriction as designed to prevent officeholders from using the government workforce "to build a powerful, invincible, and perhaps corrupt political machine," with "hundreds of thousands of federal employees, paid for at public expense," staffing a single party's "political structure and political campaigns."[30] By taking voluntary political activity off the table, the Act reduces the danger that government employees will be coerced into "perform[ing] political chores in order to curry favor with their superiors."[31]

B. The Anti-Machine Approach

Whether these particular limitations (or any others) are compatible with the First Amendment is beyond the scope of this Response.[32] But viewing campaign finance regulations through an anti-machine lens could provide a useful limitation on overly general pictures of clientelist politics. While both visions concern the diversion of public resources into private hands, the anti-machine approach addresses a particular type of diversion, one that uniquely benefits incumbent politicians. Whether a contractor seeks a plum contract in return for a donation, or an official demands a contribution before the contract goes through, the result of the kickback is that excess public spending winds up directly in the politician's own war chest.[33] The particular problem with government contractors is not that they are in a "posi-

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[28] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1053 (1996).

[29] *See* 5 U.S.C. §§ 7322–7324 (2006 & Supp. III 2009).

[30] U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565–66 (1973).

[31] *Id.* at 566.

[32] At one time, limits on public employee speech were uncontroversial, on the theory that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.). But under modern doctrine, these limits are in tension with the rule that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983).

[33] This process has advanced to an unusual degree in Japan's "construction state," in which politicians receive substantial donations in return for sponsoring expensive and unnecessary public works. *See* Thomas Feldhoff, *Japan's Construction Lobby and the Privatization of Highway-Related Public Corporations*, *in* LIVING CITIES IN JAPAN: CITIZENS' MOVEMENTS, MACHIZUKURI AND LOCAL ENVIRONMENTS 91, 91 (André Sorensen & Carolin Funck eds., 2007).

tion to distort public policy"[34] — aren't we all? — but that they are more liable to be misused by, and thus *need protection from*, those in government.

More importantly, political machines can pose a greater danger to democracy than any mere handful of contractors on the make. If politicians are spending a few million here and there for private gain, we only lose the money. But if the candidates who won the last election can vote themselves ever larger campaign treasuries, it will be that much harder to unseat them in the next election. A clientelist Congress still must search for patrons, but a self-sustaining machine is far less susceptible to democratic control.

An anti-machine approach also helps clarify which problems are easily remediable through legislation and which are not. Without committing to a particular political platform, no anticorruption effort can identify which government programs are actually diverting public resources to private gain. (Student loans? Veterans' benefits? The mortgage interest tax deduction?) But when the government embarks on a large-scale spending or regulatory project, only a vanishingly small proportion of the money changing hands will actually return to candidates in the form of contributions. These programs are largely enacted for independent reasons; some good, some bad. By contrast, there are plenty of government giveaways that virtually *no one* would support, but for their propensity to show up later in a political campaign fund.[35] The broader and more transparent the program (block transportation grants for states, say, rather than funds for individual bridges), the harder it will be for machines to capture.

In other words, the goal of anti-machine regulation would be to ensure that political self-dealing can only be done *inefficiently*, at much greater budgetary cost, and with most of the spending going elsewhere. That may seem strange. But tying self-dealing to larger projects means that each abuse will cost enough money for someone else to notice. (As usual, sunlight is the best disinfectant.) If the goal of campaign finance reform is achievable change, rather than a wholesale revision of the democratic process, an anti-machine framework might do better than the "clientelism" label at explaining why the worst offenders are really the worst.

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[34] Issacharoff, *supra* note 1, at 121.

[35] *Cf.* Shailagh Murray, *For a Senate Pork Barrel Foe, Two Bridges Too Far*, WASH. POST, Oct. 21, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102001931.html.

C. Machines and Matching Grants

The anti-machine approach may also make better sense of Issacharoff's other policy proposal: public matching grants for small individual donations.[36] The 2008 election saw an extraordinary outpouring of small donations to presidential candidates.[37] Matching, say, the first $100 of each donation with government funds would encourage candidates to seek broad-based financial support, and would double the importance of small donors as compared to government contractors or corporate fat cats.

Stated in this fashion, a program of matching donations plainly has nothing to do with clientelism — understood in the very general sense as politics that directs public resources into private hands. Perhaps small donors are thought to be less greedy than large ones (or, because they have less money, just bad at it). But plenty of large donors act for public-spirited — or "ideological" — reasons, and plenty of small donors expect material benefits from the candidates they support. Becoming "the farmers' candidate" or "the candidate of Social Security" is much easier if $100 donations from farmers and retirees have doubled in value. Matching might reduce the relative influence of the most concentrated special interests, but it increases the influence of somewhat-less-special interests that are still better organized than average.[38] (Would public-sector unions be more or less powerful if their members' donations were doubled?)

In the terminology of the Supreme Court, matching grants are actually aimed at "distortion," the presumed discrepancy between a view's actual popularity and its expression in political speech.[39] Matching makes some voices louder and others less so. As a result, it reproduces all the problems of the distortion rationale: how does the government decide whose voices, supporting which policies, deserve greater influence?[40] In some ways, matching would make the distortion problem even worse. The class of those inclined to donate $100 is even more limited, and demographically less diverse, than the embarrassingly small group of Americans who vote. If matching grants became a significant force in elections, we might expect to see politicians

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[36] *See* Issacharoff, *supra* note 1, at 137–38.

[37] *See id.*

[38] *Cf.* Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723–24 (1985) (noting that insular minorities are often better suited to wield political influence).

[39] *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 678 (1997) (arguing that the "corruption" rationale, "[p]roperly understood," is really about "political inequality").

[40] *Cf.* MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 6–7 (2001).

trying harder (than they already do) to promote the interests of America's mass upper class.[41] Whether or not that would be a bad thing, it sure wouldn't be populist.

What matching could do, though, is make progress against the specifically *political* diversion of government funds. Any spending program sufficiently broad-based to attract $100 donations would be unlikely to funnel much of its spending back into politicians' coffers. In one sense, of course, matching donations is an odd idea: to prevent covert government subsidies of political campaigns, it requires *overt* government subsidies of political campaigns. The point, however, is to make those subsidies in a more evenhanded way.

Whether matching is worth the cost is an open question. But it makes more sense as a means of forestalling machine politics than as a means of turning politics away from private gain.

III. THE LIMITS OF REFORM

A final, and perhaps paradoxical, advantage of an anti-machine framework is that it so clearly leaves many other problems unaddressed. The temptation in campaign finance reform is to imagine that politicians can, in a single stroke, repeal the logic of collective action. They can't. No matter what law is passed tomorrow, concentrated interest groups will still win out against broader but less organized coalitions. As Issacharoff noted in an earlier work, "political money, like water, has to go somewhere."[42] An effort to prevent individuals and groups from spending their own money to advocate for politicians they support will either fail, or will succeed at too great a cost to the First Amendment to be worthwhile. The government can certainly try to put its own resources to proper use — but it can't keep private interests out of politics.

For this reason, reformers trying to improve public policy should pay attention not only to legal institutions, but also to the broader political culture. Many countries still have widespread clientelism in the traditional sense, with plenty of bribery and spoils mixed in. In others — including, with all its problems, the United States — politics is fundamentally much healthier. The reason isn't just the wisdom of our campaign finance regulation: bribery is illegal pretty much everywhere. Far more important than these "parchment barriers"[43] is a cultural commitment to a politics centered on producing public goods, not transferring resources from one hand to another.

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[41] *Cf.* ROSS DOUTHAT & REIHAN SALAM, GRAND NEW PARTY 60–62 (2009).

[42] Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

[43] THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003).

The political culture also has a great deal to do with the structure of campaign finance. Part of the reason why campaigning is so expensive is that so few people will follow politics for free. Media coverage, word of mouth, and positive "buzz" are worth hundreds of millions of dollars in paid advertising,[44] and could be worth even more if more people paid attention to them. Again, as Issacharoff has rightly noted in a prior article, the most problematic thing about "media-intensive, idea-sparse, special-interest-funded campaign tactics" is that they may work.[45]

Furthermore, if the demand for special treatment is endemic in a democracy, perhaps reformers should focus on the supply. There is always more room for clientelism when more of the economy is subject to political control. Likewise, if unenacted earmarks in committee reports, congressional interference in contract negotiations, or special pleading to create jobs in particular industries were seen as outrages rather than daily events, there would be fewer avenues to transfer public revenues to private hands. As Issacharoff notes, "lobbies for special interests can sometimes succeed where matters are detailed or complex but not when they are general and simple."[46] Channeling the emotional energy behind campaign finance reform into a push for simplicity and transparency in government would help counter the powerful political pressures to keep government complex, expensive, and firmly in the private interest.

None of these goals can be achieved by enactment. What reformers can look forward to is not a single broad stroke of perfectly designed legislation, but "an unceasing struggle to clear paths through the jungle."[47] Issacharoff's effort to flesh out the concept of corruption is an extremely useful start. But recognizing the very difficulty of conceptualizing corruption may be the first step to fighting it.

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[44] *See* Ariel Levy, *Prodigal Son*, NEW YORKER, June 28, 2010, at 48, 54 (quoting a statement by Kirsten Fedewa, communications director to Mike Huckabee, that the candidate's interviews represented "two hundred million dollars in free media").

[45] Issacharoff & Karlan, *supra* note 42, at 1715.

[46] Issacharoff, *supra* note 1, at 128 (quoting MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 69–70 (1982)).

[47] JONATHAN RAUCH, GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING 267 (1999).